No. 2634

United States

Circuit Court of Appeals

For the Ninth Circuit.

CALEDONIAN INSURANCE COMPANY, ROCHESTER GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY and THE SCOTTISH UNDERWRITERS,

Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY and THE SCOTTISH UNDERWRITERS,

Defendants.

Complaint.

Plaintiff complains of defendants above named, and for cause of action alleges:

I.

That the plaintiff is, and at all times hereinafter mentioned was, a citizen of the United States and of the State of California, and a resident of the City and County of San Francisco, within the Northern District of said State.

II.

That each of the defendants, Caledonian Insurance Company and The Scottish Underwriters is, and at all said times, was, a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland; and each of the defendants, Rochester German Insurance Company and Caledonian-American Insurance Company, is, and at all said times was, a corporation organized and existing under the laws of the State of New York.

III.

That on the 31st day of March, A. D. 1906, and for several years prior thereto, said four corporations defendant were carrying on the business of fire insurance in said City and County of San Francisco, and were for the purposes of said business [1*] occupying a common office in the building No. 323 California Street in San Francisco, and one Thomas J. Conroy was then and there the manager of the business so carried on in San Francisco by each of said corporations defendant, and was by them duly empowered and authorized to contract for them as he is herein averred to have done.

IV.

That on the 31st day of March, A. D. 1906, at the City and County of San Francisco aforesaid, the said Conroy, as manager of said four corporations defendant and for their act and deed, intending thereby to obligate and bind said defendants jointly and severally, did sign, execute and deliver to this plaintiff in duplicate, a certain written agreement in words and figures following, that is to say:

"San Francisco, March 31, 1906.

"Mr. S. W. Levy,

"City.

"Dear Sir:

"Referring to our verbal understanding of recent date, have now to confirm same as follows:

"For and in consideration of the sum of One Thousand Dollars ($1,000) payable to you monthly, you agree to place in the companies represented in

*Page-number appearing at foot of page of original certified Record.

this office, or through them, any and all Fire Insurance business which you may be able to secure or control.

"That all of the business so secured or controlled by you shall be placed where it will result to the greatest benefit to the companies represented in this office, save and except that none of it shall be placed with Messrs. Ahpel & Bruckman, [2] either direct or by reinsurance;

"That you shall employ Melville S. Levy, whose services during usual business hours shall be given the companies represented in this office when not otherwise engaged on your business;

"That the consideration above expressed shall cover any and all compensation for services rendered by yourself and clerical service of your employees, to the companies represented in this office, and its management;

"If, at any time during the existence of this agreement, rates of fire insurance should be suspended in San Francisco, the terms of this agreement shall cease immediately, and in lieu thereof shall a commission of thirty-five per cent on net premiums be paid you, to date of its expiration.

"This agreement to commence April 1st, 1906, and to continue for a period of two years thereafter.

"Yours very truly,

"THOS. J. CONROY,

"Manager."

V.

That thereupon, at the same time and place, this plaintiff wrote upon one of the said duplicates of said

agreement immediately following the said signature of said manager thereto, the words "approved, S. W. Levy," and redelivered to said Conroy, as such manager, the said duplicate so signed and approved by the plaintiff.

VI.

That the words in said agreement, "the Companies represented in this office," were intended and understood by said Conroy and this plaintiff at the said time of executing said agreement to mean the said four corporations defendant, and their said office at No. 323 California Street. [3]

VII.

And plaintiff alleges that at all times after the making of said agreement, and until and including the month of April, A. D. 1907, the plaintiff duly performed on his part, all the conditions of the said agreement, and placed in the defendant companies, or through them, any and all fire insurance business which he was able to secure or control. That the rates of fire insurance were not suspended in San Francisco at any time during the existence of the said agreement, or the two years' term thereof.

VIII.

In the month of April, A. D. 1906, a great earthquake and fire occurred in the City and County of San Francisco, whereby a large portion of the said city and the buildings and property therein was destroyed. Thereafter, in the month of June, A. D. 1906, the defendants claimed and asserted to the plaintiff that by reason of said destruction of property caused by said earthquake and fire, it would not

be possible for the plaintiff to secure for the defendants the business, in consideration of which the said agreement was made. That by reason of said destruction of property, the consideration for the said agreement had failed in a material respect, and the defendants then asserted and notified the plaintiff that they would no longer recognize the said agreement as binding upon them; but that they did then and there rescind the same, and at all times thereafter until the decision of the Supreme Court of the State of California, hereinafter referred to, the defendants persisted in claiming and asserting that the said agreement was no longer in force or effect, and that they would not perform, on their part, any of the obligations thereof and wholly repudiated the said agreement, and refused to be bound thereby, and failed to perform the same in whole, [4] or in part.

IX.

That the plaintiff, notwithstanding such repudiation, continued to render his services as hereinbefore alleged, and on the 17th day of September, A. D. 1906, commenced an action against the said defendants in the Superior Court of the State of California, in and for the City and County of San Francisco, wherein the plaintiff alleged the execution of the said cotract, as hereinbefore alleged, and set forth a copy thereof, and alleged performance thereof on his part from the making of the same until and including the month of August A. D. 1906, and prayed judgment against the defendants for the sum of one thousand dollars per month for each of

the months of April, May, June, July and August, in the said year 1906.

The defendants filed their answer to the plaintiff's complaint in said action, wherein they alleged under oath that at the time of the making of the said agreement, the principal portion of the business controlled by the plaintiff consisted of risks in what was known as the business district of the City and County of San Francisco; that such business district was destroyed by the said earthquake and fire in the month of April, A. D. 1906, and that by reason thereof and the destruction of insurable property in said burnt district, it would not be possible for plaintiff to secure for the defendants the business, in consideration of the securing and procurement of which the defendants made the said agreement. And in said answer defendants further alleged that by reason of said destruction of said business portion of said city, the consideration for said agreement had failed in a material respect, in that the plaintiff would not be able to secure for defendants over twenty per cent of the business which otherwise would have been secured for the defendants. And in said answer, the defendants further alleged that immediately following said [5] destruction of said business district, they did notify the plaintiff that they would no longer recognize the agreement aforesaid, and sued upon in the said action, as binding upon them, or any of them, and did then and there rescind said agreement and did notify plaintiff that they did rescind the same.

X.

During the pendency of the said action, the plaintiff filed his supplemental complaint therein based upon the said agreemnt and the performance thereof by him during the months of September, October, November and December in the year 1906, and the months of January and February in the year 1907, and the defendants made the like defenses to the said supplemental complaint as to the plaintiff's original complaint in said action.

Thereafter, the said action came on to be tried before the said Superior Court, sitting without a jury, and Findings of Fact and Conclusions of Law were filed therein, to wit, on the 22d day of January, A. D. 1908, by the terms of which the Court found all the allegations of the plaintiff's complaint to be true; that the written agreement aforesaid contained all the agreements and understandings of the parties to the said action; that it was not true that by reason of the destruction of the business district in the answer referred to or the destruction of property, that it would not be possible for the plaintiff to secure the business in consideration of which the defendants entered into said agreement; that the said agreement had not failed in any material respect; that the plaintiff would not be unable to secure for the defendants over twenty per cent of the business, which, but for the said fire, would have secured for the defendants; but that on the contrary, the business of fire insurance at all times since the said earthquake and fire, had been conducted in the City and County of San Francisco, although the location

of the risks had [6] changed by reason of the said fire, and that the plaintiff had been able to procure, and had in fact procured for the defendants, a larger amount of business than before the fire. The Court further found that the defendants did not rescind the said agreement, but that they did, one month after the said earthquake and fire, notify the plaintiff that by reason thereof, the agreement was no longer binding upon them. As Conclusions of Law, the Court found that the plaintiff was entitled to judgment as prayed for in his complaint and supplemental complaint, and ordered judgment accordingly. Thereafter, on the 23d day of January, A. D. 1908, judgment upon the said findings was entered in favor of the plaintiff and against the defendants for the principal sum of twelve thousand and seven and 32/100 (12,007.32) dollars, with interest and costs.

XI.

Thereafter, on the 21st day of March, A. D. 1908, the defendants appealed from the said judgment to the Supreme Court of the State of California, and upon said appeal in briefs filed in the said Supreme Court and in a petition for rehearing after judgment had been rendered therein, claimed and asserted, as claimed by them in their answer in the said Superior Court, that the said agreement was no longer binding upon them and that the same had been rescinded. On the 23d day of November, A. D. 1909, the said judgment of the Superior Court was affirmed by the Supreme Court of the State of California. Thereafter, on or about the 23d day of December, A. D. 1909, the petition of the defendants for rehearing

therein was denied by said Supreme Court, and its judgment became and was final. Whereupon, a remittitur was issued from said Supreme Court to said Superior Court, and on the —— day of January, A. D. 1910, the defendants paid the said judgment. [7]

XII.

And plaintiff alleges that another action was commenced by him in the said Superior Court, to wit, in the month of April, A. D. 1907, upon the contract aforesaid, whereby he sought to recover from the defendants the sum of one thousand (1,000) dollars for his services under the said contract rendered during the month of March, A. D. 1907. That in the month of January, A. D. 1910, the defendants paid the amount so prayed for by the plaintiff in the said action last referred to, and the said action was thereupon by him dismissed.

XIV.

That save as to the sums so paid by the defendants in the month of January, A. D. 1910, in satisfaction of the judgment appealed from by them as aforesaid, and in satisfaction of the claim for services rendered during the month of March A. D. 1907, the defendants have not paid to the plaintiff any moneys on account of the said contract or services rendered by the plaintiff under the same, or at all.

XV.

That the plaintiff rendered services under the said agreement to the defendants during the month of April, A. D. 1907, and fulfilled on his part, as hereinbefore alleged, all the terms of the said agreement, but that the defendants have not paid to the plain-

tiff the sum of one thousand (1,000) dollars for services rendered during said month of April, A. D. 1907, and which by the terms of said agreement became payable to the plaintiff on the last day of April, A. D. 1907, nor have the defendants paid to the plaintiff any part thereof, or any interest thereon.

WHEREFORE, in this first count or cause of action, plaintiff prays judgment against defendants for the sum of one thousand (1,000) dollars, together with legal interest thereon from the 30th day of April, A. D. 1907, and for costs of suit. [8]

For a second and separate cause of action, the plaintiff repeats all the preceding allegations of this complaint, and makes the same a part of this second count or cause of action, and further alleges:

XVI.

That on the 27th day of April, 1907, he addressed and delivered to the defendants a letter by which he stated to them, respecting the said contract, that he would continue to render his services under the same until the end of the said month of April, A. D. 1907, at which time he would make demand upon them for his compensation according to the contract; that if they still refused payment, and still persisted in claiming that the said contract had been rescinded, he would consider that they had committed a breach of the contract and would sue them once and for all for damages. In his said letter he stated to the said defendants that he was, and always had been, ready and willing to carry out the contract on his part, and to continue it to the end of the term of two years, and that he hoped the defendants would conclude to

abandon the position which he considered, and was advised to be, utterly untenable, to wit, that the contract had been terminated by the destruction of property in the burnt district.

The defendant, by letter bearing date April 29th, A. D. 1907, replied to the plaintiff in substance as follows, to wit:

We note in your letter the reiteration of your statement so often made to the writer that the position which the companies have taken is utterly untenable, and of course it is not impossible that the courts may ultimately so hold. Until then, however, the defendants will accept the views of their own counsel and will seek the legal determination of the question in dispute. If the Courts shall ultimately determine that the [9] destruction of the principal part of the City of San Francicso, by reason of which destruction the plaintiff's ability to perform the contract between himself and the companies was destroyed, does not release the companies from their obligation under that contract, then the plaintiff will be paid the one thousand (1,000) dollars per month which he is now seeking to recover. If, upon the other hand, it shall be held that such destruction of the city did release the companies, then and in that case the plaintiff will receive the usual brokerage for the business which he has placed with the companies.

XVII.

At all said times, as plaintiff and the defendants well knew, it was impossible to obtain a determination of the questions in dispute between the plaintiff and defendants, as to whether the said contract

remained in force until more than one year after the said contract, by its terms, would have expired. That the plaintiff was ready, willing and anxious to fulfill said contract on his part until the end of the term thereof, but that the defendants, in conformity with their said letter, dated April 29th, A. D. 1907, at all times thereafter persisted in claiming and asserting that the said contract had been rescinded and was no longer in force and effect, and at all times continued to repudiate the same on their part, and refused to be bound thereby, and failed and refused to pay to plaintiff the sum of one thousand (1,000) dollars per month as provided in said contract, or any other sum as in compliance therewith, or at all.

XVIII.

Accordingly, in the month of May, 1907, the plaintiff commenced an action against the said defendants in the said Superior Court, wherein he set forth that defendants had so repudiated [10] the said agreement and wherein the plaintiff sought, as stated in his said letter, to recover from defendants all the damages sustained by him accrued and to accrue until the end of the term of the said contract, to wit, in the sum of twenty-four thousand (24,000) dollars.

The said action continued pending in said Superior Court until the month of August, 1910, at which time, and before the trial thereof, the same was dismissed on motion of the plaintiff without prejudice to the commencement of another action.

XIX.

And the plaintiff, in this second count or court of action, alleges that by such repudiation and breach

of agreement of defendants in the premises, he has sustained damage in being deprived of the benefits of the said agreement and the moneys therein provided to be paid for services to be rendered by him, from and including the month of May, 1907, to and including the month of March, 1908, together with legal interest upon said sums from the time they would have become due, and has sustained damages in the premises in the sum of $11,000.00.

XX.

For a third and separate cause of action, plaintiff repeats all the paragraphs of this complaint numbered from I to XVII, inclusive, and makes the same a part of this third count or cause of action, and further alleges:

That the plaintiff continued from and after the said month of April, 1907, until and including the month of March, 1908, to carry on at the City and County of San Francisco, the business of an insurance broker, being the same business in which he was engaged by the defendants to render services under the said agreement. That the plaintiff was unable to dispose of his insurance business from and after the month of April, 1907, to greater [11] advantage by placing the same otherwise or elsewhere than with the defendants, and that the plaintiff by placing the same with the defendants was enabled, as far as possible, to reduce the amount of damages to be recovered by him from the defendants by reason of their repudiation and breach of said agreement in the premises; accordingly, notwithstanding such repudiation and breach of agreement

on the part of the defendant, the plaintiff at all times from and after the month of April, 1907, until and including the month of March, 1908, continued to place, and did place in the defendant companies, or through them, any and all fire insurance business which he was able to secure or control, and did duly perform and fulfill on his part all the terms and conditions of the said agreement, save that he did deduct and retain to himself the usual amount of brokerage allowed for placing fire insurance business in or through fire insurance companies. Such amounts of brokerage were so deducted by the plaintiff from the premiums collected by him for the defendants as and when such premiums were collected and received by the plaintiff, and such was at all times the custom and practice of insurance brokers.

The plaintiff is ready and willing in this action, to give to the defendants credit for the amounts so deducted and retained by him, as of the first day of the month in which the same were so collected; and the following is a statement of the amounts so collected and retained by the plaintiff and the month in which the same were so collected and retained, to wit:

In the year 1907, in June, $484.03; in July, $278.40; in August, $560; in September, $361.40; in October, $362.10; in November, $191.63; in December, $315.64; in the year 1908; in January, $217.95; in February, $199.05; in March, $197.18; in April, $157.80; in May, $142; in June, $121.70. **[12]**

And plaintiff alleges that defendants accepted and

retained the services so rendered by plaintiff from and including the month of May, 1907, to and including the month of March, 1908, and accepted and retained the fire insurance business which, during said months, he so placed in them or through them; but the defendants at all times failed and refused to pay to plaintiff the sum of one thousand (1,000) dollars per month, or any other sum for such services or business, or at all.

In this third count or cause of action, plaintiff prays judgment against defendants in the sum of $7,411.62, with legal interest upon the sum of one thousand (1,000) dollars for each of the said several months from and including May, 1907, to and including March, 1908, from the end of each of said several months until paid, after crediting to the defendants upon such monthly principal sums the amount so received and retained by the plaintiff as aforesaid.

For a fourth and separate cause of action, the plaintiff repeats all the allegations contained in Paragraphs I to XX of this Complaint, and further alleges:

XXI.

That in course of transacting the business hereinbefore referred to between the plaintiff and defendants, in divers instances, insurance was placed through the defendants; that is to say: the insurance was placed with companies other than the defendants, in the name of the defendants as brokers, and the defendants received the full commission upon such insurance so placed through them. In divers

instances, the policies of insurance so placed in other companies were canceled and surrendered before the expiration of the term thereof, by reason whereof the insured became entitled to a return of a proportional part of the permium and repayment of such proportional [13] part was made by the plaintiff. That the plaintiff collected and received from the companies whose policies had been so canceled, the proportional part of the premium repayable to the insured less a proportional part of the commission which the said companies had paid and which had been received by the defendants herein. That the plaintiff made such repayments to the insured at the instance and request of the defendants herein, and that the said defendants promised and agreed to make good to and pay to plaintiff such proportional part of the commissions received by them, but failed so to do in part, and that a balance is and remains unpaid of such proportional commissions in the sum of $237.45.

WHEREFORE, in this action plaintiff prays judgment against the defendants in the sum of eight thousand six hundred and forty-nine and 7/100 (8,649.07) dollars, together with interest on $1,000 from April 30th, 1907, and interest on $1,000 from May 31st, 1907, and interest on $484.03 from June 30th 1907, and interest on $278.40 from July 31st, 1907, and interest on $560 from August 31st, 1907, and interest on $361.40 from September 30th, 1907, and interest on $362.10 from October 31st, 1907, and interest on $191.63 from November 30th, 1907, and interest on $315.64 from December 31st, 1907, and in-

terest on $217.95 from January 31, 1908, and interest on $199.05 from February 28th, 1908, and interest on $197.18 from March 31st, 1908, and interest on $157.80 from April 30th, 1908, and interest on $142 from May 31st, 1908, and interest on $121.70 from June 30th, 1908; and for costs of suit.

GOODFELLOW, EELLS & ORRICK,
Attorneys for Plaintiff. [14]

State of California,
City and County of San Francisco,—ss.

S. W. Levy, being duly sworn, deposes and says, that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

S. W. LEVY .

Subscribed and sworn to before me, this 11th day of November, A. D. 1910.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 12, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

Summons.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY, and THE SCOTTISH UNDERWRITERS,

Defendants.

Action brought in the said Circuit Court and the Complaint filed in the office of the Clerk of the said Circuit Court, in the City and County of San Francisco.

GOODFELLOW, EELLS & ORRICK.

Attorneys for Plaintiff.

The President of the United States of America, Greeting: To Caledonian Insurance Company, Rochester-German Insurance Company, Caledonian-American Insurance Company, and The Scottish Underwriters, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR and answer the Complaint in an action entitled as above, brought against you in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, within ten days after the service on you of this Summons—if served

within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgdment for any money or damages demanded in the complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

WITNESS the Honorable JOHN M. HARLAN, Senior Associate Justice of the Supreme Court of the United States, this 12th day of November, in the year of our Lord one thousand nine hundred and ten of our independence the 135th.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. **[16]**

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the hereunto annexed Summons on the 12th day of November, 1910, and personally served the same upon the Caledonian Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters by handing to and leaving an attested copy of the annexed Summons together with a copy of the Complaint attached thereto with T. J. Conroy, who is the person designated by each of the above-named defendants under the Statutes of the State of California, as the person upon whom all legal process shall be served in matters affecting each or any of the above-named defendants in the State of Califor-

nia, on the 14th day of November, 1910, in the City and County of San Francisco, in said District.

I further return that I served the annexed Summons upon the Rochester German Insurance Company by handing to and leaving an attested copy of the annexed Summons, together with a copy of the Complaint attached thereto, with Geo. O. Hoadley, who is a member of the firm of Gordon & Hoadley, which said firm of Gordon & Hoadley is designated by the said defendant Rochester German Insurance Company under the Statutes of the State of California, as the person or firm upon whom service of all legal process shall be made in matters affecting the Rochester German Insurance Company in the State of California, on the 14th day of November, 1910, in the City and County of San Francisco in said District.

Dated at San Francisco, California, this 15th day of November, 1910.

C. T. ELLIOTT,
United States Marshal.
By B. F. Towle,
Office Deputy Marshal.

[Endorsed]: Filed Nov. 16, 1910. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. **[17]**

In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER-GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY and THE SCOTTISH UNDERWRITERS,

Defendants.

Demurrer.

Now, come the defendants above named and demurring to the complaint of plaintiff on file herein, for ground of demurrer allege:

(1) That said complaint does not state facts sufficient to constitute a cause of action.

(2) That said alleged first cause of action does not state facts sufficient to constitute a cause of action.

(3 That said alleged second cause of action does not state facts sufficient to constitute a cause of action.

(4) That said alleged third cause of action does not state facts sufficient to constitute a cause of action.

(5 That said alleged fourth cause of action does not state facts sufficient to constitute a cause of action.

(6) That said complaint is ambiguous in this,

that in the third alleged cause of action, the plaintiff sets forth a credit of $3588.88, and under the same statement of facts as set forth in the alleged second cause of action, he demands judgment for $7411.62, which is $411.62 more than the amount demanded in the alleged second cause of action, where no credits are set forth.

(7) That said complaint is uncertain for the reason set forth in paragraph six.

(8) That said complaint is unintelligible for the reason **[18]** set forth in paragraph six.

WHEREFORE, defendants pray to be hence dismissed, with their costs.

OTTO IRVING WISE,
T. C. VAN NESS, Jr.,
Attorneys for Defendants.

Receipt of a copy of the within demurrer this 7th day of January, 1911, is hereby admitted.

GOODFELLOW, EELS & ORRICK,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 7, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. **[19]**

In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER-GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY, and THE SCOTTISH UNDERWRITERS,

Defendants.

Amended Demurrer.

Now come the defendants above named and demurring to the complaint of plaintiff on file herein, for ground of demurrer allege:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said alleged first cause of action does not state facts sufficient to constitute a cause of action.

3. That said alleged second cause of action does not state facts sufficient to constitute a cause of action.

4. That said alleged third cause of action does not state facts sufficient to constitute a cause of action.

5. That said alleged fourth cause of action does not state facts sufficient to constitute a cause of action.

6. That said complaint is ambiguous in this: that in the third alleged cause of action, the plaintiff sets

forth a credit of $3588.88, and under the same statement of facts as set forth in the alleged second cause of action, he demands judgment for $7411.62, which is $411.62 more than the amount demanded in the alleged second cause of action, where no credits are set forth.

7. That said complaint is uncertain for the reason set forth in paragraph six. **[20]**

8. That said complaint is unintelligible for the reason set forth in paragraph six.

WHEREFORE, defendants pray to be hence dismissed with their costs.

T. C. VAN NESS.

Due service and receipt of a copy of the within amended demurrer is hereby admitted this —— day of January, 1911.

GOODFELLOW, EELLS & ORRICK,
Attorneys for Plff.

[Endorsed]: Filed Jan. 14, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. **[21]**

At a stated term, to wit, the March term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Tuesday, the 16th day of May, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,247.

S. W. LEVY,

vs.

CALEDONIAN INSURANCE CO. et al.,

Order Overruling Demurrer to Complaint and Denying Motion to Strike Out.

Defendants' amended demurrer to the complaint and amended motion to strike out parts of the complaint, heretofore heard and submitted, being now fully considered and the Court having rendered its oral opinion thereon, it was ordered, in accordance therewith, that said demurrer be and the same is hereby overruled and that said motion to strike out be and the same is hereby denied. **[22]**

In the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER-GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY, and THE SCOTTISH UNDERWRITERS,

Defendants.

Answer and Cross-complaint of Defendants.

Defendants for answer to the complaint of plaintiff above named, and answering the first cause of

action in said complaint contained, admit, deny and allege as follows:

1. Defendants deny that plaintiff, until and including the month of April, 1907, duly, or at all, performed all, or any of the conditions of the agreement set forth in Paragraph IV of plaintiff's complaint and, or, under said contract placed in the defendant companies, and, or, through them, any and all, or any or all, fire insurance business which he was able to secure and, or control. And in this connection, defendants allege that on or about the 1st day of April, 1907, the plaintiff refused, and thereafter did continue to refuse during the life of the said contract, to wit, until the first day of April, 1908, to perform all, or any, of the terms or conditions of the said contract on his part to be performed; and that since on or about said 1st day of April, 1907, plaintiff has not been ready or willing to perform, and has not offered to perform, and has not performed, all, or any, of the terms or conditions of the said contract on his part to be performed. [23]

2. Defendants deny that in the month of June, 1906, or at any other time, or at all, they repudiated the said contract on their part. Defendants deny that at all times since the month of June, 1906, they refused to carry out and, or, perform the said contract on their part, and, or, to pay plaintiff any of the moneys therein provided to be paid, and in this connection, defendants allege that prior to plaintiff's said refusal to further perform the terms and conditions of the said contract on his part to be per-

formed, the defendant's notified plaintiff that if the Court should ultimately determine that by reason of the earthquake which occurred in the City and County of San Francisco in the month of April, 1906, the said contract was not discharged, then defendants would pay to plaintiff the sum of $1,000 for each month during which plaintiff performed the terms and conditions of the said contract on his part to be performed. Defendants admit that in or about the month of June, 1906, they claimed and asserted that by reason of the earthquake which occurred in the City and County of San Francisco in the month of April, 1906, they were entitled to rescind, and had rescinded, the said contract, and that the said contract was no longer in subsistence between plaintiff and the defendants; but defendants allege, that notwithstanding the said claim and assertion of defendants, plaintiff refused to consider the said contract at an end, and during the period of time beginning April 1st, 1906, and ending on or about April 1st, 1907, the plaintiff did perform all the terms and conditions of the said contract on his part to be performed, and did at the end of each month during said time demand from defendants their performance of the said contract, and that defendants, during all of said time, were willing to accept and receive, and did accept and receive such performance by the plaintiff. Defendants further allege in this behalf that on the first day of April, [24] 1907, and at all times thereafter until the first day of April, 1908, the day upon which the said contract was to cease by its terms, defendants were willing to accept and receive

from said plaintiff performance of the terms and conditions of the said contract on plaintiff's part to be performed.

3. Defendants allege that heretofore, and on or about the 17th day of September, 1906, the plaintiff commenced an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against these defendants, to recover from them the sum of $11,000 alleged to be due to plaintiff for his performance rendered to defendants, of all of the terms and conditions of the said contract upon his part to be performed during the period of time elapsing between the 31st day of March, 1906, and the first day of March, 1907. That thereafter, and on the 23d day of January, 1908, judgment in said action was duly given and made in favor of said plaintiff and against the said defendants for the said sum of $11,000, together with interest and costs; that said judgment was duly entered on the said 23d day of January, 1908, in Book 11 of Judgments, at page 78, in the office of the county clerk of the City and County of San Francisco, State of California; that, by the said judgment, it was adjudged that said plaintiff had duly performed all of the terms and conditions of the said contract on his part to be performed from the 31st day of March, 1906, to the 1st day of March, 1907; that said defendants have accepted and received from the said plaintiff his said performance of the said terms and conditions of the said contract on his part to be performed during the said period of time, and that, during all of said period of time, the said

contract was in subsistence betwen plaintiff and defendants. [25] That the judgment rendered in said action was upon the supplemental complaint referred to in Paragraph X of the complaint herein. That the judgment obtained by the plaintiff in said action in the Superior Court of the State of California, in and for the City and County of San Francisco, was affirmed by the Supreme Court of the State of California, and the said judgment, together with interest and costs, was paid by the defendants to the plaintiff in January, 1910, upon the issuance of a remittitur from the said Supreme Court to the Superior Court. That as to the action commenced by the plaintiff against these defendants in the said Superior Court, and referred to in Paragraph XII of the complaint herein, these defendants allege that it was agreed between them and the plaintiff by and between their respective counsel that said action should abide the judgment in the former action hereinabove referred to, and that in accordance with such agreement, these defendants paid the claim therein in said second action covering the services of this plaintiff for the month of March, 1907, and thereupon the plaintiff dismissed the said action, and said dismissal has been heretofore entered of record in the said Superior Court.

4. These defendants deny that the plaintiff rendered services under the said agreement, or under any agreement, to the defendants during the month of April, 1907, and, or fulfilled on his part all, or any, of the terms of the said agreement, and in this behalf these defendants allege that the plaintiff failed, re-

fused and neglected to render the services required of him to be performed under the terms of his said agreement during the month of April, 1907, and failed, refused and neglected to perform any of them during said month or thereafter up to and including April 1st, 1908, when said contract would be terminated by its term. [26]

5. Further answering the first cause of action of said complaint, and as a separate defense thereto, these defendants allege that from, on, or about the first day of April, 1908, the plaintiff placed with various insurance companies operating in the City and County of San Francisco, State of California, all of the fire insurance business which said plaintiff was able to secure or control during that period of time; that for said business so furnished by plaintiff, plaintiff received as commissions, the sum of $3365.21, and that plaintiff has retained, and now retains, the whole of said sum to his own use and benefit.

6. Further answering the said first cause of action, and as a separate defense thereto, these defendants allege that they are informed and believe, and upon such information and belief they allege, that if plaintiff had performed the terms and conditions of the said contract on his part to be performed during the period of time commencing on or about the first day of April, 1907, and ending on the 31st day of March, 1908, said plaintiff would have had to expend, in order to have so performed, the sum of $650.00 per month for the said period of time; that by reason of plaintiff's said nonperformance of the

terms and conditions of the said contract upon his part to be performed during the said period of time, plaintiff was not required to expend, and did not expend, the said sum of $650.00 per month for the said period of time, or any other sum, in order to perform the terms and conditions of the said contract on his part to be performed.

As and for their answer to the second cause of action set forth in the complaint above-mentioned, these defendants repeat all the preceding allegations of this answer and make [27] the same a part of their answer to the second cause of action in that complaint, and further admit, deny and allege as follows:

7. These defendants deny the allegations contained in Paragraph XVII of the complaint that at the times mentioned in said second cause of action of said complaint these defendants knew that it was impossible to obtain a determination of the questions in dispute between the plaintiff and the defendants until more than one year after the said contract, by its terms, would have expired. These defendants deny that the plaintiff was ready and, or, willing, and, or, anxious to fulfill said contract on his part until the end of the term thereof, and these defendants deny that in conformity with this letter dated April 29th, 1907, which said letter is set forth in the complaint, or otherwise, or at all, or at all or any time thereafter, they persisted in claiming and, or, asserting that the said contract had been rescinded and, or, was no longer in force and effect, and, or, at all times continued to repudiate the same on their

part, and, or, refused to be bound thereby, but they allege on the contrary that, other than the letter of April 29th, 1907, they made no further assertion or reference whatever to the contract of the plaintiff, other than that they were at all times ready to receive, and would receive, all business tendered to them by the plaintiff under the terms of the said contract aforesaid.

8. Answering Paragraph XVIII of the plaintiff's complaint, these defendants allege that the plaintiff commenced a third action against these defendants in the Superior Court of the State of California, in and for the City and County of San Francisco, in which he sought to recover the sum of $24,000.00 from these defendants as damages for an alleged breach of the [28] said contract, though at said time there was then pending in the Superior Court of the State of California, in and for the City and County of San Francisco, another action by the plaintiff against these defendants for the sum of $11,000 as damages for the breach of the said contract. The said third action brought by the plaintiff against these defendants, in which he sought to recover $24,000, was brought to trial before the Superior Court of the State of California, in and for the City and County of San Francisco, and at such trial this plaintiff asserted that he had performed the contract for the months beginning April 1st, 1907, up to April 1st, 1908, in part, and had failed to perform it in part, whereupon the motion of the defendants that the plaintiff be nonsuited was granted.

9. These defendants further answering the said second cause of action in said complaint contained, deny that by such, or any, repudiation and, or, breach of agreement of defendants in the premises, or by reason of the breach of said contract on the part of the defendants alleged by plaintiff to have been committed by the defendants, or by reason of any breach of the said contract on the part of the defendants, plaintiff has sustained damages in being deprived of the benefits of the said agreement and, or, the moneys therein provided to be paid for services to be rendered by him from and including the month of May, 1908, together with legal interest upon said sums from the time that they would become due, or that he has sustained any damage, or that he has sustained damage in the sum of $11,000, or in any other sum, or at all.

As and for their answer to the third cause of action set forth in the complaint above-mentioned, these defendants repeat all the preceding allegations of this answer, and make the same a part of their answer to the third cause of action [29] in that complaint, and further admit, deny and allege as follows:

10. These defendants have no information or belief upon the subject sufficient to enable them to answer, and therefore, and placing their denial upon that ground, they deny that after the month of April, 1907, and up to and including the month of March, 1908, plaintiff continued to carry on the business of an insurance broker the same as he had continued such business prior thereto. They deny that

he was unable to dispose of his insurance business after the month of April, 1907, to greater advantage by placing the same otherwise or elsewhere than with these defendants. They deny that by placing the said business with these defendants he was enabled as far as possible, or otherwise, or at all, to reduce the amount of damages to be recovered by him from the defendants, and they deny that, notwithstanding such, or any, alleged repudiation, or breach of agreement by these defendants, the plaintiff from and after April, 1907, up to and including the month of March, 1908, continued to place, or did place, with the defendants, or through them, any and, or, all, fire insurance business which he was able to secure and, or, control. And in this behalf, these defendants allege that the plaintiff failed, neglected and refused after the first day of April, 1907, up to and including the month of March, 1908, to perform and fulfill on his part any of the terms and conditions of the said agreement. And these defendants deny that he did duly, or otherwise, or at all, perform and, or, fulfill the terms and conditions of said agreement on his part to be performed. These defendants further allege that the plaintiff failed, neglected and refused to perform the conditions of the contract by him to be performed, [30] and did not place with these defendants, or through them, any and all fire insurance business which he was able to secure or control, but that the fire insurance business which he did bring to the offices of the defendants, he brought as a commission broker, retaining and deducting from the premiums collected by him such commissions as

are allowed to all brokers. These defendants further deny that they accepted and retained the services rendered by plaintiff from and including the month of April, 1907, to and including the month of March, 1908. And these defendants deny that he rendered any services to them from and after the first day of April, 1907; and deny that they accepted and, or, retained the fire insurance business during said period of time which this plaintiff brought to them, but that such business was brought upon a commission basis, such as is allowed and is the custom with all agents, and not under the terms of the contract which the plaintiff failed, refused and neglected to perform in any part whatsoever.

As and for their answer to the fourth cause of action set forth in the complaint above-mentioned, these defendants repeat all the preceding allegations of this answer, and make the same a part of their answer to the fourth cause of action in that complaint, and further admit, deny and allege as follows:

11. These defendants deny the allegations contained in paragraph marked XXI of the complaint herein, and deny that from and after the 1st day of April, 1907, to and including the month of March, 1908, the plaintiff placed any insurance through these defendants with companies other than the defendants in the name of the defendants as brokers, and that the defendants received the full, or any, commission upon such [31] insurance. And these defendants deny that in divers, or any, instances such insurance so placed was cancelled and, or, surrendered, by reason whereof, the insured became

entitled to a return of a proportional part of the premium, and that repayment of a proportional part of the premium was made by the plaintiff. And these defendants deny that the plaintiff collected from the companies whose policies had been so cancelled the proportional part of the premium repayable to the insured, and allege that they did not receive any part thereof. These defendants deny that the plaintiff made such, or any, repayments to the insured at the instance and, or, request of the defendants herein, and deny that they promised and, or, agreed to make good to and, or, pay to plaintiff such, or any proportional part of the commissions received by plaintiff, and deny that there is a balance thereon of $237.45, or any balance whatsoever, or any sum whatsoever, due to plaintiff from these defendants by reason thereof, or otherwise.

Further answering said complaint, and each and every cause of action therein set forth, and by way of counterclaim and cross-complaint thereto and as and for a cause of action against the plaintiff defendant, Caledonian Insurance Company, alleges:

12. That the said defendant now is, and during all of the times herein mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland.

13. That heretofore, and prior to the execution of the contract set forth in plaintiff's complaint, plaintiff and said defendant made, entered into and executed a contract similar to and to the same effect as the said contract set forth in said complaint. That

the said contract set forth in plaintiff's [32] complaint was entered into between the said parties thereto upon the expiration of the said prior contract. That, under the said contracts, and each thereof, it was understood and agreed by and between the parties thereto, that plaintiff should collect all premiums which might become due under policies of insurance which might be issued by the said defendant to persons whose insurance business might be furnished by plaintiff to the said defendant, and should pay over the whole of such premiums to said defendant.

Said defendant alleges that, subsequent to the execution of the said contracts, and each thereof, defendant issued certain policies of insurance to persons whose insurance business had been placed by plaintiff with defendant, and that, upon said policies, there became due to defendant the premiums therefor, and said defendant is informed and believes and, upon such information and belief alleges, that plaintiff collected said premiums which had not become due and has at all times since collecting the same, retained said premiums to his own use and benefit; and said defendant is informed and believes, and upon such information and belief alleges, that the amount of said premiums, so collected by plaintiff, is the sum of $2365.76.

Said defendant alleges that plaintiff has not paid to said defendant the said sum of $2365.76, or any part thereof.

WHEREFORE, said defendant prays for judgment against plaintiff for the said sum of $2365.76,

together with interest thereon.

Further answering said complaint, and each and every cause of action therein set forth, and by way of counterclaim and cross-complaint thereto, and as and for a cause of action [33] against the plaintiff, defendant, Rochester German Insurance Company, alleges:

14. That said defendant now is, and during all of the times herein mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of New York.

15. That heretofore, and prior to the execution of the contract set forth in plaintiff's complaint, plaintiff and said defendant made, entered into and executed a contract similar to and to the same effect as the said contract set forth in said complaint. That said contract set forth in plaintiff's complaint was entered into between the said parties thereto upon the expiration of the said prior contract. That, under the said contracts, and each thereof, it was understood and agreed by and between the parties thereto, that plaintiff should collect all premiums which might become due under policies of insurance which might be issued by the said defendant to persons whose insurance business might be furnished by plaintiff to the said defendant and should pay over the whole of such premiums to said defendant.

Said defendant alleges that, subsequent to the execution of the said contracts and each thereof, defendant issued certain policies of insurance to persons whose insurance business had been placed by plaintiff with defendant, and that upon said policies,

there became due to defendant the premiums therefor; and said defendant is informed and believes and upon such information and belief alleges that plaintiff collected said premiums which had so become due and has at all times, since collecting the same, retained said premiums to his own use and benefit; and said defendant is informed and believes, [34] and upon such information and belief alleges that the amount of said premiums, so collected by plaintiff, is the sum of $648.80.

Said defendant alleges that plaintiff has not paid to said defendant the said sum of $648.80, or any part thereof.

WHEREFORE, said defendant prays for judgment against plaintiff for the said sum of $648.80, together with interest thereon.

Further answering said complaint, and each and every cause of action therein set forth, and by way of counterclaim and cross-complaint thereto and as and for a cause of action against the plaintiff, defendant, Caledonian-American Insurance Company, alleges:

16. That said defendant now is and during all of the times herein mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of New York.

17. That heretofore, and prior to the execution of the contract set forth in plaintiff's complaint, plaintiff and said defendant made, entered into and executed a contract similar to and to the same effect as the said contract set forth in said complaint. That the said contract set forth in plaintiff's complaint

was entered into between the said parties thereto upon the expiration of the said prior contract. That, under the said contracts, and each thereof, it was understood and agreed by and between the parties thereto, that plaintiff should collect all premiums which might become due under policies of insurance which might be issued by the said defendant to persons whose insurance business might be furnished by plaintiff to the said defendant, and should pay over the whole [35] of such premiums to said defendant.

Said defendant alleges that, subsequent to the execution of the said contracts and each thereof, defendant issued certain policies of insurance to persons whose insurance business had been placed by plaintiff with defendant, and that, upon said policies, there became due to defendant the premiums therefor; and said defendant is informed and believes and upon such information and belief alleges that plaintiff collected said premiums which had so become due and has at all times, since collecting the same, retained said premiums to his own use and benefit; and said defendant is informed and believes, and upon such information and belief, alleges that the amount of said premiums so collected by plaintiff is the sum of $91.75.

Said defendant alleges that plaintiff has not paid to said defendant the said sum of $91.75, or any part thereof.

WHEREFORE, said defendant prays for judgment against plaintiff for the said sum of $91.75, together with interest thereon.

Further answering said complaint, and each and every cause of action therein set forth, and by way of counterclaim and cross-complaint thereto and as and for a cause of action against the plaintiff, defendant, the Scottish Underwriters, alleges:

18. That defendant now is and during all of the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland.

19. That heretofore, and prior to the execution of the contract set forth in plaintiff's complaint, plaintiff and said defendant made, entered into and executed a contract similar to [36] and to the same effect as the said contract set forth in said complaint. That the said contract set forth in plaintiff's complaint was entered into between the said parties thereto upon the expiration of the said prior contract. That, under the said contracts, and each thereof, it was understood and agreed by and between the parties thereto, that plaintiff should collect all premiums which might become due under policies of insurance, which might be issued by the said defendant to persons whose insurance business might be furnished by plaintiff to the said defendant, and should pay over the whole of such premiums to said defendant.

Said defendant alleges that subsequent to the execution of the said contracts and each thereof, defendant issued certain policies of insurance to persons whose insurance business had been placed by plaintiff with defendant, and that, upon said policies,

there became due to defendant the premium therefor; that said defendant is informed and believes and upon such information and belief alleges that plaintiff collected said premiums which had so become due and has at all times since collecting the same, retained said premiums to his own use and benefit; and said defendant is informed and believes and upon such information and belief, alleges that the amount of said premiums, so collected by plaintiff, is the sum of $631.85.

Said defendant alleges that plaintiff has not paid to said defendant the said sum of $641.85, or any part thereof.

WHEREFORE, said defendant prays for judgment against plaintiff for the said sum of $631.85, together with interest thereon.

WHEREFORE, defendants pray that plaintiff take nothing by this action, and that they have judgment for their [37] costs of suit herein; and defendant, Caledonian Insurance Company, prays for judgment against the plaintiff on its cross-complaint as herein set forth in the sum of $2365.76, together with interest thereon; and defendant, Rochester German Insurance Company, prays for judgment against plaintiff on its cross-complaint as herein set forth in the sum of $648.80, together with interest thereon; and said defendant, Caledonian-American Insurance Company, prays for judgment against the plaintiff on its cross-complaint as herein set forth for the sum of $91.75, together with interest thereon; and the defendant The Scottish Underwriters, prays for judgment against the plaintiff on its cross-com-

plaint as herein set forth in the sum of $631.81, together with interest thereon.

T. C. VAN NESS,
OTTO IRVING WISE,
Attorneys for Defendants.

State of California,
City and County of San Francisco,—ss.

Thomas J. Conroy, being duly sworn, deposes and says: That he is an officer of the Caledonian Insurance Company, one of the defendants named herein, namely, the manager thereof and as such officer is authorized to verify this answer; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

THOS. J. CONROY.

Subscribed and sworn to before me this 16th day of June, A. D. 1911.

[Seal] M. V. COLLINS,
Notary Public, in and for the City and County of San Francisco, State of California. [38]

Due service and receipt of a copy of the within Answer & Cross Comp. is hereby admitted this 16th day of June, 1911.

GOODFELLOW, EELLS & ORRICK,
Attorneys for Plff.

[Endorsed]: Filed Jun. 16, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [39]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY et al.,

Defendants.

Answer to Cross-complaint.

Now comes the plaintiff, and for answer to the cross-complaint herein of the Caledonian Insurance Company, admits that the plaintiff, at divers times in the said cross-complaint referred to, collected premiums as therein alleged; but denies that the plaintiff retained the same, or any of them or any part thereof, to his own use or benefit, and denies that the plaintiff has not paid to the defendant the amount stated in said cross-complaint, or any part thereof, but alleges that before the commencement of this action the plaintiff paid to the defendant all premiums at any time collected by him, save that subsequent to the month of April 1907, he did deduct and retain to himself the usual amount of brokerage allowed for placing fire insurance business in or through fire insurance companies, as alleged in his original complaint herein, being the amounts for which, in said original complaint, he has offered to give credit. And plaintiff alleges that as to all other premiums at any time collected by him for said cross-complainant, he did, before the commencement of

this action, pay over the whole thereof to the said cross-complainant. [40]

And for further answer, this defendant says respecting any claims of the said cross-complainant under the contract made in the year 1906 in the said cross-complaint referred to, that an action was commenced by the plaintiff against the said cross-complainant in the Superior Court in and for the City and County of San Francisco, in the month of September, 1906, and a supplemental complaint was filed therein in the month of March 1907, and another action was commenced by him upon the same contract in the month of April 1907, all as alleged in his complaint herein, and that the said cross-complainant did not in its answers, or any of them, filed in any of said actions, set up a counterclaim against the plaintiff; by reason whereof and of the provisions of section 439 of the Code of Civil Procedure of this State, the said cross-complainant is debarred from maintaining any claim against the plaintiff arising out of the transactions set forth by the plaintiff in his said several complaints so filed in the said Superior Court as the foundation of his claims therein.

And for answer to the cross-complaint of the defendant Rochester German Insurance Company, the plaintiff admits that he did at divers times in the said cross-complaint referred to, collect premiums as therein alleged; but denies that the plaintiff retained the same, or any of them or any part thereof, to his own use or benefit, and denies that the plaintiff has not paid to the defendant the amount stated in said cross-complaint, or any part thereof, but alleges that

before the commencement of this action the plaintiff paid to the defendant all premiums at any time collected by him, save that subsequent to the month of April 1907, he did deduct and retain to himself the usual amount of brokerage allowed for placing [41] fire insurance business in or through fire insurance companies, as alleged in his original complaint herein, being the amounts for which, in said original complaint, he has offered to give credit. And plaintiff alleges that as to all other premiums at any time collected by him for said cross-complainant, he did, before the commencement of this action, pay over the whole thereof to the said cross-complainant.

And for further answer, this defendant says respecting any claims of the said cross-complainant under the contract made in the year 1906 in the said cross-complaint referred to, that an action was commenced by the plaintiff against the said cross-complainant in the Superior Court in and for the City and County of San Francisco, in the month of September 1906, and a supplemental complaint was filed therein in the month of March 1907, and another action was commenced by him upon the same contract in the month of April 1907, all as alleged in his complaint herein, and that the said cross-complainant did not in its answers, or any of them, filed in any of said actions, set up a counterclaim against plaintiff; by reason whereof and of the provisions of section 439 of the Code of Civil Procedure of this State, the said cross-complainant is debarred from maintaining any claim against the plaintiff arising

out of the transactions set forth by the plaintiff in his said several complaints so filed in the said Superior Court as the foundation of his claims therein.

And for answer to the cross-complaint of the defendant Caledonian-American Insurance Company, the plaintiff admits that he did at divers times in the said cross-complaint referred to, collect premiums as therein alleged; but denies that the plaintiff retained the same, or any of them or any [42] part thereof, to his own use or benefit, and denies that the plaintiff has not paid to the defendant the amount stated in said cross-complaint, or any part thereof, but alleges that before the commencement of this action the plaintiff paid to the defendant all premiums at any time collected by him, save that subsequent to the month of April 1907, he did deduct and retain to himself the usual amount of brokerage allowed for placing fire insurance business in or through fire insurance companies, as alleged in his original complaint herein, being the amounts for which, in said original complaint, he has offered to give credit. And plaintiff alleges that as to all other premiums at any time collected by him for said cross-complainant, he did, before the commencement of this action, pay over the whole thereof to the said cross-complainant.

And for further answer, this defendant says respecting any claims of the said cross-complainant under the contract made in the year 1906 in the said cross-complaint referred to, that an action was commenced by the plaintiff against the said cross-complainant in the Superior Court in and for the City

and County of San Francisco, in the month of September, 1906, and a supplemental complaint was filed therein in the month of March, 1907, and another action was commenced by him upon the same contract in the month of April, 1907, all as alleged in his complaint herein, and that the said cross-complainant did not in its answers, or any of them, filed in any of said actions, set up a counterclaim against plaintiff; by reason whereof and of the provisions of Section 439 of the Code of Civil Procedure of this State, the said cross-complainant is debarred from maintaining any claim against the plaintiff arising out of the transactions set forth by the plaintiff in his said several complaints so filed in the said Superior Court as the foundation of his claims therein. [43]

And for answer to the cross-complaint of the defendant the Scottish Underwriters, the plaintiff admits that he did at divers times in the said cross-complaint referred to, collect premiums as therein alleged; but denies that the plaintiff retained the same, or any of them or any part thereof, to his own use or benefit, and denies that the plaintiff has not paid to the defendant the amount stated in said cross-complaint, or any part thereof, but alleges that before the commencement of this action the plaintiff paid to the defendant all premiums at any time collected by him, save that subsequent to the month of April 1907, he did deduct and retain to himself the usual amount of brokerage allowed for placing fire insurance business in or through fire insurance companies as alleged in his original complaint, he has offered to give credit. And plaintiff alleges that as

to all other premiums at any time collected by him for said cross-complainant, he did, before the commencement of this action, pay over the whole thereof to the said cross-complainant.

And for further answer, this defendant says respecting any claims of the said cross-complainant under the contract made in the year 1906 in the said cross-complaint referred to, that an action was commenced by the plaintiff against the said cross-complainant in the Superior Court in and for the City and County of San Francisco, in the month of September 1906, and a supplemental complaint was filed therein in *in* the month of March 1907, and another action was commenced by him upon the same contract in the month of April, 1907, all as alleged in his complaint herein, and that the said cross-complainant did not in its answer, or any of them, filed in any of said actions, set up a counterclaim against plaintiff; by reason whereof and of the provisions of Section 439 [**44**] of the Code of Civil Procedure of this state, the said cross-complainant is debarred from maintaining any claim against the plaintiff arising out of the transactions set forth by the plaintiff in his said several complaints so filed in the said Superior Court as the foundation of his claims therein.

WHEREFORE, plaintiff prays that defendants take nothing by their cross-complaint, and that plaintiff have judgment in accordance with the prayer of the original complaint on file herein.

GOODFELLOW, EELLS & ORRICK,
Attorneys for Plaintiff.

State of California.
City and County of San Francisco,—ss.

S. W. Levy, being duly sworn deposes and says, that he is the plaintiff in the above-entitled action; that he has read the foregoing answer to cross-complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

S. W. LEVY.

Subscribed and sworn to before me, this 26th day of June, A. D. 1911.

[Seal] M. V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California.

Service of a copy of the within is hereby acknowledged this 26th day of June, A. D. 1911.

T. C. VAN NESS,
OTTO IRVING WISE,
Attorneys for Defts.

[Endorsed]: Filed June 26, 1911. Southard Hoffman, Clerk. [45]

At a stated term, to wit, the July Term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Wednesday, the 4th day of October, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,247.

S. W. LEVY,

vs.

CALEDONIAN INSURANCE COMPANY.

Order Amending Answer.

* * * * * * * * *

On motion of Mr. Wise it was ordered that defendants' answer may be amended as follows, to wit, on page 5, paragraph 5 line 10 and insert in lieu thereof the words and figures "April 1, 1907" strike out the words and figures "April 1, 1908"/and on page 8 paragraph 9 lines 2 and 3 strike out the words and figures "May 1908" and insert in lieu thereof the words and figures "April 1907." **[46]**

* * * * * * * * *

At a stated term, to wit, the July Term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Thursday the 5th day of October, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,247.

S. W. LEVY

vs.

CALEDONIAN INSURANCE CO. et al.

Order Allowing Plaintiff to File Amendment to Complaint.

The parties hereto by their respective counsel and the jury, heretofore impaneled herein being present the trial hereof was resumed and upon motion of Mr. Goodfellow it was ordered that plaintiff may file an amendment to the complaint. [47]

* * * * * * * *

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY et al.,

Defendants.

Amendment to Complaint.

Plaintiff by leave of Court, amends the prayer of his complaint so that the same shall read as follows:

"Wherefore, in this action plaintiff prays judgment against the defendants in the sum of eight thousand six hundred and forty-nine and 7/100 (8,649.07) dollars, together with interest on $1,000 from April 30th, 1907, and interest on $1,000 from May 31st, 1907, and interest on $515.97 from June 30th, 1907, and interest on $721.60 from July 31st, 1907, and interest on $430, from August 31st, 1907, and interest on $638.60 from September 30th, 1907, and interest on $637.90 from October 31st, 1907, and interest on $808.37 from November 30th, 1907, and

interest on $684.36 from December 31st, 1907, and interest on $782.05 from January 31st, 1908, and interest on $800.95 from February 28th, 1908, and interest on $802.82 from March 31st, 1908, and interest on $842.20 from April 30th, 1908, and interest on $858. from May 31st, 1908, and interest on $878.30 from June 30th, 1908; and for costs [48] of suit."

GOODFELLOW, EELLS & ORRICK,
Attorneys for Plaintiff.

[Endorsed]: Filed October 5, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [49]

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER-GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY, and THE SCOTTISH UNDERWRITERS,

Defendants.

Verdict.

We, the jury, find in favor of the plaintiff and assess the damages against the defendants in the

sum of eleven thousand seven hundred ten & 57/100 ($11,710.57) Dollars.

TIMOTHY HOPKINS,
Foreman.

[Endorsed]: Filed Octr. 5, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. **[50]**

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER-GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY and THE SCOTTISH UNDERWRITERS,

Defendants.

Judgment [Filed and Entered October 5, 1911].

This cause having come on regularly for trial upon the 4th day of October, 1911, being a day in the July, 1911, Term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein, W. S. Goodfellow and W. H. Orrick, Esqrs., appearing on behalf of plaintiff and O. I. Wise, Esq., appearing on behalf of the defendants, and the trial having been proceeded with upon the 5th day of October in said year and term and evidence, oral and documentary, upon be-

half of the respective parties having been introduced and closed and the cause, after arguments of the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict which was ordered recorded, viz.: "We, the jury, find in favor of the plaintiff and assess the damages against the defendants in the sum of eleven thousand seven hundred ten and 57/100 ($11,710.57) Dollars. Timothy Hopkins, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs;

Now, therefore, by virtue of the law, and by reason of the premises aforesaid, it is considered by the Court that S. W. Levy, plaintiff, do have and recover of and from Caledonian Insurance [51] Company, Rochester German Insurance Company, Caledonian-American Insurance Company, and The Scottish Underwriters, defendants eleven thousand seven hundred ten and 57/100 ($11,710.57) Dollars, together with his costs in this behalf expended taxed at $64.35.

Judgment entered October 5, 1911.

SOUTHARD HOFFMAN,
Clerk.
By W. B. Maling,
Deputy Clerk.

A true copy. ATTEST:
[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Maling,
Deputy Clerk.

[Endorsed]: Filed October 5, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [52]

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

No. 15,247.

S. W. LEVY,

vs.

CALEDONIAN INS. CO., et al.

Clerk's Certificate to Judgment-roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said Circuit Court this 5th day of October, 1911.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed October 5, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [53]

At a stated term, to wit, the March term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 10th day of March, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,247.

S. W. LEVY,

vs.

CALEDONIAN INSURANCE CO. etc., et al.

Order Spreading Mandate on Minutes.

Upon motion on behalf of T. C. Van Ness, Esq., attorney for defendants, it was ordered that the mandate of the United States Circuit Court of Appeals, herein, be filed and spread upon the minutes of this court, which said mandate is in words and figures following, to wit: [54]

* * * * * * * *

[Mandate of U. S. Circuit Court of Appeals.]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Judges of the District [Seal] Court of the United States for the Northern District of California, Second Division, Greeting:

Whereas, lately in the District Court of the United

States for the Northern District of California, Second Division, before you, or some of you, in a cause between S. W. Levy, Plaintiff, and Caledonian Insurance Company et al., Defendants, No. 15,247, a judgment was duly filed and entered on the 5th day of October, A. D. 1911, in favor of the said plaintiff and against the said defendants; which said judgment is of record in the said cause in the office of the clerk of the said District Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), [55] as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of a writ of error agreeably to the Act of Congress in such cases made and provided fully and at large appears:

And Whereas, on the 16th day of May, in the year of our Lord one thousand nine hundred and twelve, the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly argued and submitted to the Court for consideration and decision. [56]

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the plaintiffs in error and against the defendant in error, and that this cause be, and hereby is remanded to the said District Court for a new trial.

It is further ordered and adjudged by this Court that the plaintiffs in error recover against the de-

fendant in error for their costs herein expended, and have execution therefor.

(Oct. 7, 1912.)

You, therefore, are hereby commanded that such new trial, execution and further proceedings be had in the said cause in accordance with the opinion and judgment of this Court and as according to right and justice and the laws of the United States ought to be had, the said judgment of said District Court of the said District Court notwithstanding.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the third day of March, in the year of our Lord one thousand, nine hundred and thirteen.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Amount of costs allowed and taxed in favor of the plaintiffs in error and against the defendant in error, as per annexed bill of items taxed in detail: $199.25.

F. D. MONCKTON,

Clerk. [57]

Bill of Items Annexed to Mandate Pursuant to Section 5, Rule 31.

Debit Item No.	Debit Items.	Dr.	Cr.
1	Docketing Cause and Filing the Record....	5 00	
2	Entering —2 Appearance	50	
3	Entering Continuance		
4	Entering 3 Order	60	
5	Filing 5 Papers	1 25	
6	Filing Briefs for Each Party Appearing (2)	10 00	
7	Filing Supp. Brief Plff. in E.....	5 00	
8	Filing		
9	Filing Argument		
10			
11	Transferring Cause on Printed Calendar (2)	2 00	
12	Drawing, Filing and Recording Decree or Judgment	1 65	
13			
14	Filing Petition for a Rehearing.....	5 00	
15	" Ans. to Do.	5 00	
16	Filg. Reply to Do.	5 00	
17			
18			
19	Issuing Mandate, $5.00; Costs and Copy, $0.40	5 40	
20			
21	Total, Miscellaneous Costs.....	46 40	
22	Expense, Printing Record.....	96 50	
23			
24	Total of Debit Items.....142 90		

Credit Item No.	Credit Items.	
1	Deposited Account Misc. Costs Plff. in Error	34 95
2	" " " " Deft. in Error	11 45
3		
4		
5	Expense, Printing Record	96 50
6		
7	Total of Credit Items.....	142 90
8	Balance	
	Totals 142 90	142 90

Item No.	Itemized Bill of Costs Allowed and Taxed.	Amount.
1	Certified Cost of Transcript from Court Below	47 80
2		
3	Deposit.....Account Misc. Costs.....	34 95
4	Total Expense, Printing Record.....	96 50
5		
6		
7	Attorney's Docket Fee	20 00
8	Balance Costs	
	Total (Inserted in Body of Mandate) Taxed at	199 25

Attest: F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. [58]

[Endorsed]: No. 15,247. U. S. District Court, in Northern District of California, Second Division. No. 2113. United States Circuit Court of Appeals for the Ninth Circuit. Caledonian Insurance Co., etc., et al., vs. S. W. Levy. Mandate. Filed and spread on the minutes of the said District Court, March 10, 1913. W. B. Maling, Clerk. [58]

In the District Court of the United States, Northern District of California.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, et al.,

Defendant.

Stipulation Waiving Jury.

IT IS HEREBY STIPULATED that a jury in the above-entitled action is waived.

Dated, Dec. 11th, 1913.

GOODFELLOW EELLS & ORRICK,
Attorneys for Plaintiff.
THOMAS C. VAN NESS,
OTTO IRVING WISE,
Attorneys for Defendants.

[Endorsed]: Filed April 17, 1914, Walter B. Maling, Clerk. [59]

At a stated term, to wit, the July term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California Second Division, held at the courtroom in the City and County of San Francisco, on Friday, the 25th day of September, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge:

No. 15,247.

S. W. LEVY,

vs.

CALEDONIAN INSURANCE CO. et al.

Order for Judgment.

This cause heretofore tried and submitted being now fully considered and the Court having rendered its oral opinion thereon, it was ordered that judgment be entered in favor of plaintiff and against defendants in the sum of $14,081.53 and for costs

[60]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY and THE SCOTTISH UNDERWRITERS,

Defendants.

Judgment [Filed and Entered September 25, 1914].

This cause having come on regularly for trial on the 10th day of December, 1913, before the Court sitting without a jury, and a trial by jury having been specially waived by written stipulation of the parties; Hugh Goodfellow and W. H. Orrick, Esqrs., appear-

ing as attorneys for the plaintiff and T. C. Van Ness and Otto I. Wise, Esqrs., appearing as attorneys for the defendants; and the trial having been proceeded with on the 11th day of December, 1913, and evidence on behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for consideration and decision, briefs having been filed, and the Court, after due deliberation, having ordered that judgment be entered in favor of plaintiff and against said defendant in the sum of Fourteen Thousand Eighty-one and 53/100 ($14,081.53) Dollars, and for costs:

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that S. W. Levy, plaintiff, do have and recover of and from Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters, defendants, the sum of Fourteen Thousand Eighty-one and 53/100 ($14,081.53) Dollars, together with his costs in this behalf expended taxed at $65.95. [61]

Judgment entered September 25, 1914.

WALTER B. MALING,
Clerk.

A True Copy. ATTEST:
[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed Sept. 25, 1914. Walter B. Maling, Clerk. [62]

In the District Court of the United States, for the Northern District of California.

No. 15,247.

S. W. LEVY,

vs.

CALEDONIAN INSURANCE CO. et al.

Clerk's Certificate to Judgment-roll.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 25th day of September, 1914.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed Sept. 25, 1914. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [63]

[Proceedings Had December 11, 1913.]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, a Corporation, and ROCHESTER GERMAN INSURANCE COMPANY, a Corporation, CALEDONIAN-AMERICAN INSURANCE COMPANY, a Corporation, and SCOTTISH UNDERWRITERS, a Corporation,

Defendants.

DEFENDANTS' BILL OF EXCEPTIONS.

BE IT REMEMBERED, that heretofore, to wit, on the 11th day of December, 1913, before the above-entitled court, Hon. Wm. C. VAN FLEET, Judge of said court presiding, plaintiff appearing by his counsel, Messrs. Goodfellow, Eells & Orrick, and defendants appearing by their counsel, T. C. Van Ness, Esq., and Otto Irving Wise, Esq., said cause came before the Court sitting without a jury, a jury having been expressly waived by stipulation of the parties, duly filed in the court, and thereupon the following evidence and exhibits were introduced and the following proceedings were had, to wit:

Mr. Orrick, who made the opening statement on behalf of plaintiff, stated the substance of the first, second and fourth counts of the complaint, and the

facts which plaintiff intended to establish thereunder. With reference to the third count, he said:

"The third count is not involved here for the reason it proceeds on the idea of performance and since it is the law of the case, as I understand it, that from and after the end of April, 1907, the plaintiff did not perform because he had [64] retained 15 per cent to cover office expenses out of the premiums instead of remitting the whole of the premiums we are not concerned with the third count. Your Honor will recall the argument made here at the former trial, with respect to the retention of the 15 per cent as not involving a material breach of the contract. I am not going into that because I consider that we are bound by the law of the case, and I shall not attempt to make any argument, or to take any position at this hearing which in any way will involve a disregard of what the law of the case has established on the appeal. So I will say nothing further with reference to performance after the end of April, 1907, or with reference to the third count, for that is the count which is devoted to the theory of performance and upon which we went to the jury at the former trial.

The COURT.—That was the proposition upon which the case was reversed, was it not?

Mr. ORRICK.—Yes."

Mr. Wise then made the opening statement on behalf of defendants.

Plaintiff's counsel thereupon offered to submit the case on the evidence taken on the former trial thereof as shown in the reporter's transcript of said trial,

supplemented by such additional testimony as should be offered. In the course of the discussion which ensued, Mr. Van Ness said:

"Mr. VAN NESS.—I am willing to admit, and it seems to me that the admission is as broad as anything you could claim. In the beginning we took the position that by reason of the destruction of San Francisco we were released and so notified you, and you considered we were not released and insisted on going on with the contract. I told you that if we were wrong [65] in our view we would pay you the $1000 a month. We took that position from the beginning to the end."

The Court then ordered, pursuant to the agreement of the parties, that the evidence taken at the former trial as shown by the reporter's transcript thereof, should be considered in evidence at this trial.

The following is the substance of the evidence at the former trial.

[Testimony of D. J. Wren, for Plaintiff.]

D. J. WREN, called as a witness for the plaintiff, being duly sworn, testified as follows:

I have been in the employ of plaintiff for about twenty-five years. He was sick in April, 1907. During the month of April, 1907, I took complete charge of the bookkeeping of plaintiff's business and have been familiar with Mr. Levy's business from that time until the end of the contract with defendants.

Mr. WISE.—I will admit as a rule it takes the Supreme Court more than a year to reach an appeal from the Superior Court.

(Testimony of D. J. Wren.)

Mr. Conroy, the person who made the contract on behalf of the defendants, was their agent at all the times referred to in the pleadings in this case.

The contract with defendants was made in 1906 and was performed by plaintiff up to and including March, 1907.

Q. Will you state whether or not after that time there was any difference in the performance of the contract of furnishing business to the insurance companies?

A. Except in the collection of the commissions (the witness continuing) the business went on the same and he furnished the business to them as before. Mr. Levy turned over to these insurance companies, or through them, all of the insurance business which he controlled. After the month of March, [66] 1907, Mr. Levy placed all the insurance he could in Mr. Conroy's office, but if Mr. Conroy could not take any business we offered, we placed it on the outside, but to his credit as the broker. Mr. Levy after the month of March, 1907, collected fifteen per cent commission and retained it for that year, after notifying Mr. Conroy's office that he was going to do that and hold it for office expenses. The first payment we made Mr. Conroy's office was in June, on business that was placed during the year from April, 1907, to April, 1908; when we made that payment, instead of making Mr. Conroy a payment of the gross amount of the premium, we paid him net, and we told him the reason we were doing so was we withheld those commissions to pay office expenses. The money was

(Testimony of D. J. Wren.)
there always on demand. Any time Mr. Conroy made a demand for money, it would be turned over to him. I so informed Mr. Anderson, his cashier, when I made my first payment in June, 1907. Defendants did not pay Mr. Levy anything for the months of April, May or June, 1907.

Q. Generally, how long is it after a policy is issued before you collect the premiums?

A. Sixty days. We send the assured a bill sixty days prior to collection day. One of the clerks in Mr. Levy's office would go around and do the collecting. Then a day or two after that a statement would be made out of our office of the collections and turned over to Mr. Conroy's office with a check.

We paid Mr. Conroy's office twice a month, immediately after collection day. The 13th and 28th were collection days. If a policy was made out on the 1st of March, we did not bill the assured until the 1st of June, or until the collection day, the 13th of June. We did not bill the assured for sixty days. At that time we were allowed sixty days for collection of [67] premiums. The first or second day after we collected moneys from the assured, on collection day, we settled with Mr. Conroy. If money would come in in the middle of the week, or between the first of the month and collection day, we did not pay that in until a collection day, when we made a general statement of the entire amount. From and after March, 1907, until the end of March, 1908, Mr. Melville S. Levy continued in the employ of his father, S. W. Levy.

(Testimony of D. J. Wren.)

I am familiar with the position taken by the insurance companies that they would not remain bound by this contract and that they claimed it was at an end.

Q. Did you ever have any conversation with Mr. Conroy afterwards about this matter?

A. Except to ask for the $1,000.00 a month which Mr. Levy sent me down to do, or Mr. Coggins or his son.

Q. I will ask you whether or not they continued to claim that they were not bound by that contract, until the Supreme Court judgment came out about a year and a half after the contract was at an end?

A. They did, yes, sir. After the month of March, 1907, Mr. Levy conducted the same character of business that he had done before. The brokerage of fifteen per cent which I have referred to was a uniform rate among the insurance companies in San Francisco at that time.

Q. Any person giving insurance business whether to these defendants or to any other companies in town would get the same commission, fifteen per cent?

A. Yes, sir. There was no advantage. They all paid it. It was here stipulated that the insurance rates were not suspended in San Francisco at any time during the life of this contract.

After the month of March, 1907, when we offered Mr. Conroy's [68] companies business, they would take it whenever they could write it. When we placed business with other companies in their

(Testimony of D. J. Wren.)

name, they made no objection at any time.

The COURT.—Did you pursue the same course and place all your business through that office after that date, the same as before?

A. Yes, your Honor.

Q. But after that date you did deduct the 15 per cent commission on premiums?

A. In making our payments, yes, sir.

Mr. GOODFELLOW.—Q. After the month of June I thought you said?

A. It was during the month of June, but that was for the insurance of the month of April, previously placed.

Mr. GOODFELLOW.—Q. Now, I want you to explain about these return commissions, that is, about this small item of $237.45.

Counsel for the respective parties thereupon stipulated that the allegations of the complaint respecting the practice pursued in the matter of said return premiums were true, but no stipulation as to the amount of said returned premiums was entered into by defendants' counsel.

Mr. GOODFELLOW.—The amount alleged here is $237.45.

Mr. GOODFELLOW.—Q. I will ask you, Mr. Wren, whether or not there is a balance of that amount which was not paid to you by Mr. Conroy's companies on account of these returned commissions?

A. Yes, sir, there was that amount, $237.45.

Cross-examination.

These figures have all been gone over by Mr. Con-

(Testimony of D. J. Wren.)

roy's cashier previously to our coming here.

Q. Now, Mr. Wren, in this case, there is no controversy as to the first 12 months' period of these two years; in other [69] words, as you know, Mr. Levy has received the money for the first 12 months; that is correct, is it not? A. That is correct.

Q. Beginning April 1, 1907, do you know whether the same proceedings were had in your office for the procuring of business as obtained prior to that time?

A. We used the same methods, yes, sir.

Q. You made no distinction in the method of doing it from what you had done previously—you followed the same course? A. Yes.

Q. Neither in form nor in amount nor method—there was no change?

A. We pursued the same methods as we had done theretofore.

Q. The only difference was that prior to April, 1907, you did not deduct the commissions?

A. That is correct.

Q. After April 1, 1907, and for the second twelve-month period, Mr. Levy deducted from the volume of business which he produced fifteen per cent commission, the same commissions which any broker would have received who brought the business into Mr. Conroy's company? A. Yes, sir.

Q. Now you have said on direct examination that you do not know whether the company paid $1,000 for May or June; you mean by that, that you did not get any money?

(Testimony of D. J. Wren.)

Mr. GOODFELLOW.—He said they did not pay him any money.

A. I did not receive it. The money previous to the fire came in to me in a check, $1,000 a month; I never received any money after that.

Mr. Melville S. Levy was employed by his father during all of the second twelve-month period. He was there during the entire year, with the exception of while he was home in bed sick. I do not know how long a period his sickness covered. It was no more than a month. Mr. Melville S. Levy devoted all [70] of his time to the business outside of the period of his illness.

Mr. WISE. — Q. Mr. Goodfellow asked you whether in April or May, 1907, the defendant companies did not continue to say to you that they were not bound, and I think you answered yes; let me direct your attention to this: During the beginning of the second twelve months' period, did not have any conversation with Mr. Conroy about the contract?

A. Well, I could say that I did, but I could not give any particular dates. I would meet Mr. Conroy in the office and he would say: "What are you doing here?" I would say, "Well, I came down for that one thousand dollars salary you owe us." I have spoken to him in that strain on more than one occasion. So have other members of the office force.

(The witness continuing.) The defendants continued to handle and to write the business that we presented during the second twelve months' period

(Testimony of D. J. Wren.)

the same as they had done before. All the business we would bring into their office they would write for us provided they could take it. They did not change their methods in any way whatever during the second twelve months' period.

Q. Did you continue, after April 1st, 1907, to make a monthly demand for the $1,000.00?

A. Personally, no, not myself.

Redirect Examination.

In the first and second years I spoke to Mr. Conroy on more than one occasion about the payment of the $1,000.00 a month. He just laughed at me when I asked him for it. I was in and out of that office every day. I do not know whether it was monthly that I spoke to him; I might have asked him two or three times a week.

Recross-examination.

Q. Do we understand you correctly that it was during the [71] entire second twelve-month period that you frequently said to Mr. Conroy how about our check for $1,000.00?

A. When I would meet Mr. Conroy I would ask him about our $1,000.00 check.

The COURT.—Q. How often did that occur during the second twelve months?

A. Oh, on several occasions anyway. Mr. Levy instructed me to notify Mr. Conroy's office that we would withhold the commissions for the second year to pay the office expenses, which I did. This was in June, 1907, when we were making the first payments of the second year's business. About the 3d of

(Testimony of D. J. Wren.)

June, 1907, I called on Mr. Conroy, at Mr. Levy's request, and told him that from that time we would deduct fifteen per cent of the commissions collected for office expenses.

Q. Do you know whether after that interview you were ever authorized to make your monthly visit and demand the $1,000?

A. I don't think I was. I was not told not to make the visit either. Mr. Conroy never said he was willing to carry out the contract, or pay the $1,000 a month.

Mr. GOODFELLOW.—That is the case for the plaintiff.

[Testimony of Thomas J. Conroy, for Defendants.]

THOMAS J. CONROY, called as a witness for the defendants being duly sworn, testified as follows:

For some years prior to the earthquake, and since I have been the general agent of the four defendants insurance companies, my offices received all business which Mr. Levy brought to me during the second twelve month period of the contract in controversy the same as we had done prior thereto. The method of payment for that business was changed. In June, 1907, Mr. Levy deducted his commissions for April business. The customary *broker* of fifteen per cent was deducted.

Q. At that time was anything said to you as to the reason [72] for such deduction?

A. Nothing.

Q. Did you laugh at Mr. Wren when he came to you?

(Testimony of Thomas J. Conroy.)

A. No, sir. The relations between Mr. Levy's employees and myself have always been very friendly. Sometimes the demands would be made by Mr. Wren, sometimes by Mr. Coggins (Mr. Levy's clerk), or sometimes by Mr. Levy's son. Mr. Wren would come in and ask for the $1000.00 and we would say: "Well, Dan, I don't think we owe you this money, but if we do, we will pay it." That statement was made by me as often as they came in. The demands were made only during the first year period.

Mr. WISE.—Mr. Goodfellow, you wrote a letter to Mr. Conroy of which this is a copy. I cannot put my hands upon the original right now. Do you recognize it?

Mr. GOODFELLOW.—Oh, yes.

Mr. WISE.—I would like to ask permission to introduce the letter in full as evidence.

Mr. GOODFELLOW.—I have no objection.

(The letter was here marked Defendants' Exhibit No. 1, and read as follows:)

[Defendants' Exhibit No. 1—Letter, April 27, 1907, Goodfellow & Eells to Thomas J. Conroy et al.]

"San Francisco, Apr. 27—07.

Office of Goodfellow & Eells, San Francisco, Cal.

Thomas J. Conroy, Esq.,

Caledonian Insurance Company:
Rochester German Insurance Company:
Caledonian-German Insurance Co., and
The Scottish Underwriters.

Dear Sir:

We are instructed by Mr. S. W. Levy to inform you of his intentions respecting the contract which

he made with you dated March 3rd, 1906, to wit:

He will continue to render his services under the contract until the end of the present month, at which time he will make demand upon you for his compensation, according to the contract. If you still refuse payment and still persist in claiming that the contract has been rescinded, he will consider that you have committed a breach of the contract and will sue you once and for all for damages.

Mr. Levy is, and always has been, ready and willing [73] to carry out the contract on his part and to continue it to the end of the term of two years. He hopes that you will conclude to abandon the position which he considers, and is advised to be utterly untenable, to wit: that the contract has been terminated by the destruction of property in the burned district.

We are,

Yours very truly,

GOODFELLOW & EELLS.

P. S. We beg to notify you also that we have advised Mr. Levy for his protection, to issue a writ of attachment in each of the cases pending, which writ will be issued on Monday next; we give you this notice in order that you may be prepared to furnish the necessary bond on release of attachment."

Q. Did I understand you to say that after April 1, 1907, there was no discussion between you and Mr. Levy or his representatives in reference to the contract? A. Nothing.

[Testimony of S. W. Levy, for Defendants.]

S. W. LEVY, called as a witness for the defendants, being first duly sworn, testified as follows:

I am the plaintiff in this action. The letter you now show me, addressed to the defendants and dated June 22, 1906, bears my signature.

(The letter is then introduced in evidence, marked Defendants' Exhibit No. 2, and reads as follows:)

[Defendants' Exhibit No. 2—Letter, June 22, 1906, S. W. Levy to Caledonian Insurance Co. et al.]

"S. W. Levy,
Commission Merchant and Insurance Agent.
Telephone Main 143
Temporary Address, 1629 Broadway,
San Francisco, June 22d, 1906.

Caledonian Insurance Company.
Scotch Underwriters.
Caledonian-American Insurance Co.
Rochester German Insurance Co.
City.

Gentlemen:

Referring to your note of June 21st, 1906, in which you declare that my contract with you, dated March 31st, 1906 by which you undertook to pay me $1000.00 monthly for two years from April 1st, 1906, is 'rescinded,' I beg to reply that I do not recognize your right, so to terminate the contract, and that I insist on its performance. I have in all respects kept this contract on my part, and am now doing so, and I intend to keep it, fully and fairly, during its term; and I shall expect to be paid by you, the stipulated consideration. You are now in arrears for April and

May, and unless full payment for three months is made to me by July 1st, I shall be compelled to bring suit against you, jointly and severally, for the sum then due.

Very truly yours,

S. W. LEVY." [74]

Subsequent to the writing of this letter and for the first 12 month period of this contract, I brought my business to the defendant companies and made no deductions for commissions. I was not paid the $1,000 per month but the $12,000 was paid long afterwards, after the decision of the Supreme Court.

It was here stipulated that the counterclaim and cross-complaints filed by the defendants in this case be withdrawn as far as this case is concerned.

After the Court had ordered that the testimony at the former trial be considered in evidence, plaintiff's counsel called Thomas J. Conroy as a witness for plaintiff, who testified as follows:

[Testimony of Thomas J. Conroy, for Plaintiff.]

Mr. ORRICK.—Q. Mr. Conroy, during the years 1906, 1907 and 1908 you were manager of these four defendant insurance companies, were you not?

A. Yes, sir.

Q. During that period of time and after April 1st, 1906, do you recall Mr. Levy or any of his office force having called upon you making demand for the $1,000 monthly under the contract of March 31st, 1906? A. Yes, sir.

Q. Please state what occurred on those occasions?

A. This was during the first twelve months?

Q. Yes.

(Testimony of Thomas J. Conroy.)

A. Usually Melville Levy would call to make demand for the $1,000 a month. My reply was I did not think I owed him the money; the exact wording now of course I cannot remember because it was so many years ago. Whether or not I used the word "rescinded" I am not able to state positively at this time; I may have.

Q. I call your attention to the testimony given by you in the case of S. W. Levy against Caledonian Insurance Company before Judge Hosmer?

A. Judge Seawell. [75]

Q. I think it was tried before Judge Hosmer and then Judge Hosmer died and Judge Seawell finally decided it. That was the case he decided in favor of Mr. Levy in which you stated in answer to these questions as follows:

"Mr. VAN NESS.—Q. Speaking about the matter of those payments in your office by Mr. Levy, do you, of your own knowledge, know that Mr. Levy was informed that the companies would not, in accepting those premiums, recognize the previous contract that had been made? A. Yes, sir."

Another question by Mr. VAN NESS.

"Q. With relation to the matter of Mr. Levy's demand for payment under the contract, what do you know concerning information to himself and those coming to your office to make those demands? Tell us what the facts are in regard to that.

"A. Application was made each month by Mr. Melville Levy, Mr. S. W. Levy may have been there once, but Mr. Melville Levy came there each month

(Testimony of Thomas J. Conroy.)
and asked for the $1,000 for his father, and he was told that''—then the answer continues—''we could not pay it, that the contract had been rescinded.'' Was that testimony correct?

A. At that time, yes.

Q. You stated that this occurred during the first year, have you any recollection as to whether any demands were made during the second year?

A. None.

Q. You have no recollection on that subject?

A. No, sir, there were no demands made.

Q. Now, Mr. Conroy, these premiums which Mr. Levy remitted to you, what was the course of business respecting the time when they were remitted after the policies were issued?

A. After the destruction of the city the Board of Underwriters fixed a limit of 45 days in which premiums had to be paid. [76] There were some extensions to 60 days; it was Mr. Levy's custom always to present a statement of his business written 60 days prior and to send a check less 15 per cent commission on the second year.

Q. So the premiums were not payable to your office when policies were issued by your office but 45 days or more thereafter?

A. Not at all. Mr. Levy as broker would receive the policies and delivered them; whether or not he collected them immediately or 45 or 60 days after I do not know. His custom during all the time he was connected with the office was to make a statement every 60 days.

(Testimony of Thomas J. Conroy.)

Mr. ORRICK.—There was a letter written on the 21st of June, 1906, which does not appear in the record at the first trial, and it is as follows: "San Francisco, June 21, 1906. S. W. Levy, Esq., San Francisco, Cal. Dear Sir: This will serve to notify you that the consideration for the agreement under date of March 31, 1906, heretofore entered into between yourself and the undersigned companies, having by reason of the recent destruction of San Francisco, failed in a material respect, said agreement has been and hereby is rescinded." That is signed by R. C. Christopher representing the Caledonian Insurance Company, The Scottish Underwriters and the Caledonian-American Insurance Company. Mr. Atwood representing the Rochester German Insurance Company.

Mr. VAN NESS.—That is our original letter.

Mr. WISE.—No objection to it.

Mr. ORRICK.—Will you admit, Mr. Van Ness, that on April 25th, 1907, you filed this brief in the Superior Court and served a copy of it on us? [77]

Mr. VAN NESS.—I suppose the brief speaks for itself.

Mr. ORRICK.—They take the position in their brief, and I know it is Mr. Van Ness' position all along, at least down to the time the Supreme Court rendered its decision that the contract was rescinded.

Mr. VAN NESS.—We will object to the papers filed in other proceedings. I am making the admission as broad as it can be made. I do not want to go

(Testimony of Thomas J. Conroy.)

back and be held to anything I stated in that brief.

The COURT.—You can read the statement.

Mr. ORRICK.—Was it your position or the position of the companies in April, 1907, that this contract had been rescinded and did not bind the defendant companies?

Mr. VAN NESS.—That has always been my position and I so advised the companies and they proceeded on that advice by reason of the destruction of San Francisco the law gave us the right to rescind the contract, and you got that letter, but Mr. Levy refused to accept the rescission and went on and took the business and we took the business.

Mr. ORRICK.—I want to call Mr. Wren.

The Court.—What do you want to show by this witness?

Mr. ORRICK.—May it please the Court, I wish to show by Mr. Wren and it may be clear enough now from the record that during April and May Mr. Levy paid these defendants companies without any deduction whatever.

Mr. VAN NESS.—For the preceding last two months.

The COURT.—For the months of February and March.

Mr. WISE.—We admit that.

Mr. VAN NESS.—We admit that the premiums due on the business in February and March, 1907, were thereafter paid to the [78] company.

Mr. GOODFELLOW.—The admission we want is that every premium he collected during the months

(Testimony of Thomas J. Conroy.)

of April and May was paid over.

Mr. WISE.—What Mr. Goodfellow is trying to get at is something to this effect. If they collected moneys in the month of April or May, 1907, no matter for which month's business they collected the money they turned over to us all they collected. That is not the fact.

The COURT.—I must confess I think you are fighting over straws; I do not care about that. I will detrmine that for myself.

Mr. GOODFELLOW.—I do not see that it adds anything to the case at all.

The COURT.—What does the testimony show here? The testimony shows that the settlements under this contract between Levy and the insurance company for premiums was made every 60 days. Now, it has already appeared here that a 60 day period settlement took place on the 1st of June. There is no question but what he had paid over regularly at those periods all previous premiums.

Mr. ORRICK.—That is all I had in mind. That is our case.

The foregoing constitutes and is all the evidence taken and introduced, or pursuant to stipulation considered as evidence taken and introduced, upon the foregoing trial herein.

Thereafter, and on the 25th of September, 1914, the Court rendered an oral opinion in the above-entitled action as follows:

[Opinion (Oral).]

The COURT (Orally).—In the case of Levy vs.

Caledonian Insurance Company, on a former trial before a jury verdict and judgment went for plaintiff, but upon appeal this judgment was reversed and the cause remanded. The case has now been tried a second time before the Court, the jury being waived. [79]

The material question upon which judgment principally turns is whether the cause of action stated in the second count of the complaint, upon which plaintiff now relies, is one "upon the contract," that is, based upon the theory of performance of the contract, as contended by the defendants, or is one to recover damages for the defendants' breach in its repudiation of the contract, as contended by plaintiff. If the former, plaintiff's right to recover is concluded by the law of the case as announced by the Circuit Court of Appeals on the appeal from the former judgment (199 Fed. 407); since the evidence as to what was done by the parties tending to establish performance was substantially the same on this trial as on the former. If the latter, then the law of the case does not apply, since the theory upon which plaintiff is now proceeding was not involved in the judgment of the Appellate Court.

That a party is entitled to plead his cause of action in different forms and in varied and inconsistent counts there is no question, and that a failure to make a cause under one count will not preclude recovery under another and different count, although involving an entirely distinct and different theory, is equally true. It cannot always be definitely known what theory as represented by the different forms of pleading

the evidence in its legal effect will sustain, and a party is not required to hazard his right to recover upon a single cast. As to the main cause of action alleged, it is asserted in two forms, the one alleging and based upon the theory of a full performance of the contract and a right to recover thereunder, which was the count relied upon on the former trial; the other, under which plaintiff now seeks recovery, alleging the facts fully as to what was done by the parties to the contract and seeking [80] damage as for its repudiation or breach by defendant. I am of opinion that the latter count cannot be said in its legal aspects to "count upon the contract" in the sense insisted by defendants —that is, it does not proceed upon the theory of performance but is to be regarded as stating a cause of action arising upon defendants' breach. This being so, does the evidence sustain that theory and entitle plaintiff to recover under that count? There is no material conflict in the evidence as to what was done, and the facts need not be recited in detail. In April, 1907, plaintiff notified defendants by letter that if they still continued to maintain their right to renounce or repudiate the contract and refuse to carry it out, he should at the end of that month treat their repudiation as final and sue them as for an entire breach. They answered that they should maintain the same attitude until it should be finally determined by the courts that it was unauthorized, and accordingly plaintiff did sue them in the Superior Court as for a total breach, and that action was maintained until plaintiff was nonsuited, whereupon the present action was brought. During the

remainder of the period covered by the terms of the contract, while plaintiff continued as before to take his insurance to the defendants, he from that date withheld the usual brokerage fees of fifteen per cent. instead of paying the premiums in their entirety to defendants as stipulated in the contract. It is true that this was done in a manner to indicate that plaintiff believed, or at least hoped, that the course he was pursuing would constitute a substantial compliance with the terms of the contract, and enable him to recover therefor, and that was the theory upon which the first trial proceeded. In fact there is no doubt but that what plaintiff did in the [81] premises was intended to give him "two strings to his bow." In other words, that if his acts did not constitute a performance it would put him in a position to recover as for a breach. This aspect of the evidence is what is largely relied upon as characterizing the action as one proceeding on the theory of performance and so bringing it within the rule of the law of the case under the judgment of the Court of Appeals, holding that the acts of the plaintiff in the premises did not constitute performance. But it is not by what plaintiff hoped to accomplish by his acts that the result is to be determined, but by the legal effect of what he did; and although plaintiff's course did not, as he evidently hoped, constitute in law a performance, this result cannot militate against his right to have those acts construed, if they are otherwise sufficient, as entitling him to maintain the alternative right to recover as for a breach. He had suffered a wrong through defendants' renunciation

of its contract, and finding that he could not change their attitude in that regard he determined to treat it as a breach and proceed in a manner that would enable him to have recompense for their default in one form or the other. In this there was no wrong to the defendants. It was but a precaution to protect himself from loss by reason of their refusal to carry out their contract. Nor do I think plaintiff's refusal at first to acquiesce in defendants' renunciation of the contract precluded him from his subsequent determination to do so. The contract was one which gave him a new right of action monthly, and he was entitled to change his course as to defendants' renunciation at any time before the contract was at an end as to all payments thereafter falling [82] due. I think, therefore, the facts entitle plaintiff to recover. The basis of recovery under this count I understand is not in dispute, but is to be taken, in the event of judgment for plaintiff, to be the difference between the compensation stipulated by the contract and the sums plaintiff received in the form of brokerage, all of which are fully set forth in the complaint.

As to the recovery sought under the first and fourth counts, respectively, I do not regard them as concluded by the law of the case. As to the first count, I think under the terms of the contract plaintiff's right of action was perfect at the end of the month, and his subsequent retention of a part of the premiums for that month could not affect that right. As to the fourth count, it is not dependent upon the contract, but is simply for money paid and laid out for the defendants under circumstances which

clearly entitle plaintiff to have it returned.

Judgment will accordingly go for plaintiff. Should the parties desire special findings, they may be had; and in that event the entry of judgment will await their filing. Should they not be desired, judgment will be entered in due course.

Thereafter and on said 25th day of September, 1914, pursuant to the order of Court, judgment was entered in said case in favor of the plaintiff, and against the defendants, for the sum of $14,081.53, and for costs and disbursements incurred by the plaintiff in said action. **[83]**

Stipulation [for Allowance of Bill of Exceptions].

It is hereby stipulated and agreed that the foregoing Bill of Exceptions, having been regularly continued into the term of this Court commencing on the first Monday in November, to wit, the 2d day of November, 1914, was presented by the defendants within the time allowed by law therefor, and that the same is a true and correct copy of the proceedings had at the trial of the above-entitled action, and that the same may be certified, allowed and settled as provided by law and the practice of this court. Dated: February 25th, 1915.

GOODFELLOW, EELLS, MOORE & ORRICK,

Attorneys for Plaintiff.

OTTO IRVING WISE,

T. C. VAN NESS,

Attorneys for Defendants.

[Order Settling and Allowing Bill of Exceptions.]

I, the undersigned Judge of the District Court of the United States, Northern District of California, Second Division, who presided at the trial of the above-entitled action, and the settlement of the said Bill of Exceptions having been regularly continued into the term of this court commencing on the first Monday of November, 1914, to wit, on the 2d day of November, 1914, and said Bill of Exceptions having been presented by the defendants within the time allowed by law therefor, and having found the same to be true and correct, do hereby certify, settle and allow the same and order that it be filed with the clerk of said court.

Dated Feby. 25, 1915.

WM. C. VAN FLEET,
Judge. **[84]**

[Endorsed]: Filed Feb. 25, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[85]**

In the District Court of the United States, Northern District of California, Second Division.

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY and THE SCOTTISH UNDERWRITERS,

Defendants.

Petition for Writ of Error.

Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance and The Scottish Underwriters, the defendants above named, feeling themselves aggrieved by the decision of the above-entitled Court and the judgment entered thereupon on the 25th day of September, 1914, whereby it was adjudged that the plaintiff have and recover from the defendants the sum of Fourteen Thousand, and Eighty-one and 53/100 ($14,081.53) Dollars, and his costs and disbursements incurred in said action, and having within the time allowed by law therefor petitioned the above-entitled Court for a new trial and rehearing in the above-entitled action, and said Court having duly entertained said petition for a new trial and rehearing, and the hearing of said petition having been duly and regularly continued by said Court

for hearing to the 15th day of February, 1915, and the same having been on said 15th day of February, 1915, heard by and submitted to said Court for consideration and decision, and said Court having thereupon, on the 7th day of June, 1915, denied the said [86] petition for rehearing and a new trial herein, come now by T. C. Van Ness and Otto Irving Wise, as their attorneys, to petition said Court for an order allowing them to prosecute a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of the supersedeas bond which the defendants shall give and furnish upon said writ of error, and that upon the giving of such bond all further proceedings in this court shall be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals.

And your petitioners will ever pray.

OTTO IRVING WISE,
T. C. VAN NESS,
Attorneys for Defendants and Plaintiffs in Error.

[Endorsed]. Filed Jun. 25, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [87]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY and THE SCOTTISH UNDERWRITERS,

Defendants.

Assignment of Errors.

Come now the defendants above named and file the following assignment of errors upon which they, and each of them, will rely upon their prosecution of the writ of error in the above-entitled action:

1. That the said United States District Court, in and for the Northern District of California, erred in overruling the demurrer interposed by the defendants and plaintiffs in error to the original complaint filed in said cause of action.

2. That the said United States District Court, in and for the Northern District of California, erred in denying the motion of the defendants and plaintiffs in error to strike out portions of the original complaint filed by the plaintiff in said action.

3. That the said United States District Court, in and for the Northern District of California, erred in overruling the demurrer interposed by the de-

fendants and plaintiffs in error to the amended complaint filed by plaintiff in said action.

4. That the said United States District Court, in and for [88] the Northern District of California, erred in denying the motion of the defendants and plaintiffs in error to strike out portions of the amended complaint filed by plaintiff in said action.

5. That the said United States District Court, in and for the Northern District of California, erred in granting plaintiff and defendant in error leave to file his amended complaint in said action.

6. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error.

7. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error and in entering judgment in accordance therewith.

8. That the said United States District Court, in and for the Northern District of California, erred in rendering and entering its judgment in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error.

9. That the said United States District Court, in and for the Northern District of California, erred in entering its judgment in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error.

10. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in said action in favor of the plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that said decision is against law.

11. That the said United States District Court, in and for [89] the Northern District of California, erred in rendering its decision and entering its judgment thereon in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that said decision and judgment are against law.

12. That the said United States District Court, in and for the Northern District of California, erred in entering its judgment in said action in favor of the plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that the said judgment is against law.

13. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in said action in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that the evidence is insufficient to justify said decision, and that upon the uncontradicted and uncontroverted evidence in said action the said Court should have rendered its decision in favor of the defendants and plaintiffs in error in said action and against the plaintiff and defendant in error.

14. That the said United States District Court, in and for the Northern District of California, erred

in rendering its decision and entering its judgment thereon in said action in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that upon the uncontradicted evidence, and as to which there is and was no dispute, said Court should have rendered its decision in favor of the defendants and plaintiffs in error and against the plaintiff and defendant in error.

WHEREFORE, the said defendants and plaintiffs tiffs in error, and each of them, pray that the judgment of the District Court of the United States, in and for the Northern District of California, Second Division, be reversed, and that said cause may be remanded [90] to said United States District Court, in and for the Northern District of California, Second Division, with instructions to said Court to enter judgment for the defendants and plaintiffs in error.

T. C. VAN NESS,
OTTO IRVING WISE,
Attorneys for Defendants and Plaintiffs in Error.

[Endorsed]: Filed Jun. 25, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [91]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY and THE SCOTTISH UNDERWRITERS,

Defendants.

Order for Issuance of Writ of Error.

On motion of T. C. Van Ness and Otto Irving Wise, attorneys for defendants and plaintiffs in error, and upon the filing of a petition for a writ of error and an assignment of errors,

IT IS ORDERED that the writ of error, as prayed for in said petition, be allowed, and that the amount of the supersedeas bond to be given by said defendants and plaintiffs in error upon said writ of error be, and the same is hereby, fixed at the sum of seventeen thousand four hundred dollars, and that upon the giving of said bond all further proceedings in this court shall be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Dated June 25th, 1915.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Jun. 25, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[92]**

[Bond.]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY and THE SCOTTISH UNDERWRITERS,

Defendants.

KNOW ALL MEN BY THESE PRESENTS: That we, Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters, as principals, and National Surety Company of New York (a corporation), as surety, are held and firmly bound unto the plaintiff in the above-entitled action in the sum of Seventeen Thousand Five Hundred ($17,500.00) Dollars, for which payment well and truly to be made, we bind ourselves, and each of us jointly and severally, our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 26th day of June, 1915.

WHEREAS, the above-named defendants, Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters, have sued out a writ of error in the United States District Court, in and for the Northern District of California, Second Division, to reverse the judgment entered in the above-entitled action in favor of the plaintiff therein and against the defendants therein for the sum of Fourteen Thousand and Eighty-one 53/100 ($14,081.53) Dollars, interests and costs; [93]

NOW, THEREFORE, the condition of this obligation is such that if the above-named Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters shall prosecute such writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

ROCHESTER GERMAN INSURANCE COMPANY,

By T. C. VAN NESS, Jr.

CALEDONIAN INSURANCE COMPANY,

CALEDONIAN-AMERICAN INSURANCE COMPANY,

THE SCOTTISH UNDERWRITERS,

By A. C. OLDS,

Joint Mgr.

NATIONAL SURETY COMPANY,
By FRANK L. GILBERT,
Resident Vice-President.
[Seal] By E. MAHONEY,
Resident Asst. Secretary.

This bond is approved.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Jun. 26, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[94]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY and THE SCOTTISH UNDERWRITERS,

Defendants.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing ninety-four (94) pages, numbered from 1 to

94, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $52.20; that said amount was paid by the attorneys for the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 4th day of August, A. D. 1915.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Cancelled Aug. 4, 1915. J. A. S.] [95]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America,
To the Honorable, the Judges of the District Court of the United States for the Northern District of California. Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Caledonian Insurance Company, Rochester

German Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters, Plaintiffs in Error, and S. W. Levy, Defendant in Error, a manifest error hath happened, to the great damage of the said Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters, Plaintiffs in Error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 26th day of

June, in the year of our Lord one thousand nine hundred and fifteen.

WALTER B. MALING,
Clerk of the United States District Court,
Northern District of California.

Allowed by

WM. C. VAN FLEET,
United States District Judge. **[96]**

Service of the foregoing Writ of Error, and receipt of a copy thereof, at the City and County of San Francisco, in the Northern District of California, is hereby admitted this 26th day of June, 1915.

GOODFELLOW, EELLS, MOORE & ORRICK,
Attorneys for Defendant in Error.

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] ————————————,
Clerk.

[Endorsed]: No. 15,247. United States District Court for the Northern District of California. Caledonian Insurance Company et als., Plaintiffs in Error, vs. S. W. Levy, Defendant in Error. Writ

of Error. Filed Jun. 28, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to S. W. Levy, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 26th day of June, A. D. 1915.

WM. C. VAN FLEET,
United States District Judge. **[97]**

Service of the foregoing Citation on Writ of Error, and receipt of a copy thereof, at the City and County of San Francisco, in the Northern District of California, is hereby admitted this 26th day of June, 1915.

GOODFELLOW, EELLS, MOORE & ORRICK,

Attorneys for Defendant in Error.

[Endorsed]: No. 15,247. United States District Court for the Northern District of California. Caledonian Insurance Company et als., Plaintiffs in Error, vs. S. W. Levy, Defendant in Error. Citation on Writ of Error. Filed Jun. 28, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2634. United States Circuit Court of Appeals for the Ninth Circuit. Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance Company and the Scottish Underwriters, Plaintiffs in Error, vs. S. . Levy, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed August 5, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CALEDONIAN INSURANCE COMPANY, etc., et als.,

Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

Order Extending Time to File Record on Writ of Error and to Docket the Case.

Good cause appearing therefor it is ordered that the plaintiffs in error may have to and including the 6th day of August, 1915, within which to file the record on writ of error and to docket the case in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 24, 1915.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals.

[Endorsed]: No. 2634. United States Circuit Court of Appeals for the Ninth Circuit. Caledonian Insurance Company, etc., et als., Plaintiffs in Error, vs. S. W. Levy, Defendant in Error. Order Extending Time to File Record on Writ of Error and to Docket the Case. Filed Jul. 24, 1915. F. D. Monckton, Clerk. Refiled Aug. 5, 1915. F. D. Monckton, Clerk.